8-17-2010

State v. Folk Respondent's Brief Dckt. 36244

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 36244
	)	
vs.	)	
	)	
JONATHAN EARL FOLK,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

HONORABLE JON J. SCHINDURLING
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Jonathan Earl Folk appeals from his judgment of conviction for lewd conduct with a minor child under the age of sixteen years.

Statement of the Facts and Course of the Proceedings

Charity Reed had three children, including a son, "T.R.," who, at the time of Folk's crime, was five years old. (Tr., p.203, Ls.8-24.) Charity and her husband (Brian Reed), Charity's grandmother, and Charity's three children, lived in the grandmother's home. (Tr., p.203, L.20 - p.204, L.10.) During the 2007 Christmas period, Charity's aunt's adult stepson, Blaine Blair, was allowed by the grandmother to stay at the residence against Charity's wishes. (Tr., p.204, L.14 - p.205, L.22; p.219, L.7 - p.220, L.7.) Jonathan Folk was a distant relative of Charity whom she had met once prior to seeing him when he dropped Blair off at Charity's house a couple days before Christmas. (Tr., p.206, L.20 - p.207, L.4.)

On Christmas day, Charity drove her cousin's children to their mother's home, and when she returned home Folk was there. (Tr., p.204, Ls.19-21; p.205, L.15 - p.206, L.6.) Also present at Charity's home was April Prock and her two children. (Tr., p.205, Ls.19-22.) Charity went into the kitchen for ten to fifteen minutes to help her grandmother prepare dinner, and when she came out, she asked her husband where T.R. was because dinner was ready. (Tr., p.207, L.25 - p.209, L.23.) Charity's husband said he thought T.R. was in his bedroom playing, and as Charity walked about the corner through the door to the boys' room, she heard T.R. say, "ew, that's gross." (Tr., p.243, Ls.6-9; p.257, Ls.8-12.)

Charity saw Folk kneeling down in front of T.R. with T.R.'s legs around him, and Folk's hands on T.R.'s hips. (Tr., p.209, L.23 - p.210, L.12.)

Charity asked Folk what he was doing, and he told her they were just playing. (Tr., p.210, Ls.14-15.) T.R. began to laugh and went right to Charity as Folk backed away. (Tr., p.210, Ls.15-17.) Folk stood in the bedroom for a couple of minutes, then he left after the other children entered the bedroom. (Tr., p.210, Ls.20-22.) Charity asked T.R., "what were you guys doing in here?" and T.R. said they were just playing. (Tr., p.210, Ls.23-25.) Charity went to the living room and after noticing Folk trying to play with the rest of the children and attempting to pick up her four-year-old son, she told April she had a bad feeling that something just happened. (Tr., p.211, Ls.5-20.) Right before Blair and Folk left the house, Folk handed T.R. -- but not any of the other children -- some candy and change out of his pocket. (Tr., p.212, Ls.5-11.) After Blair and Folk left, T.R. "was kind of shying away from everybody," and was clinging to Charity, which was unusual. (Tr., p.218, Ls.11-24; p.385, Ls.13-17.)

At 8:30 p.m., the children's usual bedtime, T.R. did not want to go to his bed, but instead ended up sleeping with Charity's grandmother. (Tr., p.213, Ls.5-14.) At about 4:00 the next morning, Charity was awoken by T.R., who told her he had just had a nightmare, and when asked what it was about, he explained he had a "bad dream about what that guy did to me last night." (Tr., p.213, Ls.14-18.) Later that morning Charity called the police. (Tr., p.213, L.23 - p.214, L.19.) While waiting for the police to arrive, Charity took T.R. aside and asked him what happened the night before, and he told her "Johnny" (T.R.'s name for Folk) put

his mouth on his (T.R.'s) penis. (Tr., p.215, Ls.1-5.) Charity did not know what to do, so she just hugged T.R. and held him. (Tr., p.215, Ls.5-7.) When T.R. asked Charity if he was going to be in trouble, she reassured him he would not, and told him he had done the right thing by telling her about the incident. (Tr., p.215, Ls.7-10.) A police officer arrived shortly thereafter. (Tr., p.215, Ls.18-19.)

According to T.R., when he and Folk went into his bedroom, just before his mother came into the room, he was laying down on his bed when Folk pulled his clothes half-way down "just where he could see [his] private," and put his mouth on T.R.'s private. (Tr., p.320, L.4 - p.322, L.8; p.347,Ls.5-7; p.349, Ls.10-23.) T.R. explained:

> A. He took his mouth -- and when he took his mouth off, he went (sound).
>
> Q. He went (sound). Is that the sound that he made?
>
> A. Yeah. He went (sound).

(Tr., p.322, Ls.15-19.) When T.R. tried to yell for his mother, Folk covered his mouth.[1] (Tr., p.325, Ls.2-5; p.341, Ls.20-24; p.342, Ls.3-8.)

Folk was charged with lewd conduct with a minor under sixteen. (R., Vol. 1, pp.56-57.) At the pre-trial conference, Folk asked for permission to represent himself and was allowed to do so -- with standby counsel appointed to "address any particular technical or legal issues there might be." (Supp. Tr., p.15, L.19 - p.16, L.1; p.18, Ls.20-24; p.22, Ls.19-25.) The court noted that Folk's request opened up potential issues as to how T.R. could be appropriately cross-

[1] During trial, the state presented testimony by three witnesses that had either been victims of, or witnesses to, prior bad sex acts committed by Folk upon them or others as children years earlier. (*See generally* Tr., pp.402-454.)

examined by Folk himself. (Supp. Tr., p.16, L.18 - p.17, L.19.) The state filed a motion requesting cross-examination of T.R. be conducted by Folk's standby counsel or, alternatively, without visual contact through audio technology. (R., Vol. 1, pp.116-117.) The trial court granted the state's motion, and permitted T.R. to testify in a separate room through closed circuit video outside the direct presence of Folk. (R., Vol. 2, pp.196-204; Tr., p.311, L.12 - p.315, L.2.) Additionally, the trial court ruled that T.R. could only be cross-examined by Folk submitting written questions to his standby counsel to ask. (R., Vol. 2, pp.196-204.)

The jury convicted Folk on the lewd conduct charge (R., Vol. 2, pp.366-367), and he was ordered to serve a fixed life sentence (R., Vol. 2, pp.312-313). Folk timely appealed. (R., Vol. 2, pp.317-320.)

ISSUES

Folk states the issues on appeal as:

1) Did the district court err when it violated Mr. Folk's speedy trial rights?

2) Did the district court commit reversible error when it deprived Mr. Folk of his constitutional right to confront his accuser?

3) Did the district court commit reversible error when it deprived Mr. Folk his constitutional right to represent himself?

4) Did the district court deny Mr. Folk's rights to due process of law, by incorrectly instructing the jury that Mr. Folk could be guilty of lewd conduct by making any type of sexual advance when it refused to remove "et cetera" from the clarifying instruction?

5) Under the doctrine of cumulative error, was Mr. Folk's right to a fair trial denied as a result of the accumulation of serious errors throughout his trial?

(Appellant's Brief, p.18.)

The state rephrases the issues as:

1. Has Folk failed to demonstrate any violation of his statutory or constitutional right to a speedy trial?

2. Has Folk failed to show that his constitutional right to confront his accuser was violated?

3. Has Folk failed to show that his constitutional right to self-representation was violated?

4. Has Folk failed to demonstrate the trial court erred by its answer to the jury's question about Instruction Sixteen?

5. Has Folk failed to show that the cumulative error doctrine applies to this case?

ARGUMENT

I.
Folk Has Failed To Demonstrate Any Violation Of His Statutory Or Constitutional Rights To A Speedy Trial

A. Introduction

Folk contends his statutory (I.C. § 19-3501) and state and federal constitutional rights to a speedy trial were violated by the delay of his jury trial to approximately one year after charges were filed against him in district court. (Appellant's Brief, pp.19-37.)

Folk's constitution-based speedy trial arguments were not preserved for appellate review because he failed to present them to the district court as constitutional claims and the trial court did not rule on such claims. Folk's claim that his statutory speedy trial right was violated should be rejected because: (1) the issue is moot because the only remedy possible was dismissal without prejudice and a fair trial -- the latter of which Folk has already received; (2) Folk requested one continuance of his trial date within the six-month speedy trial period, therefore his statutory speedy trial right was no longer in effect; and (3) there was "good cause" to continue Folk's trial date beyond the statutory six-month period.

B. Standard Of Review

The issue of speedy trial rights is a mixed question of fact and law. Deference is given to factual determinations which are supported by substantial evidence, with the appellate court exercising free review over application of the

law to the facts found by the trial court. State v. McNew, 131 Idaho 268, 269, 954 P.2d 686, 687 (Ct. App. 1998).

C. Folk Has Failed To Preserve The Argument That His State And Federal Constitutional Rights To A Speedy Trial Were Violated

Folk asks this Court to vacate his conviction and dismiss his case with prejudice, arguing that he was deprived of his state and federal constitutional rights to a speedy trial. (Appellant's Brief, pp.19-37.) This Court must decline to consider the merits of Folk's claim, however, because it was not preserved for appellate review.

It is well settled that issues not raised below will generally not be considered for the first time on appeal. State v. Averett, 142 Idaho 879, 888-89, 136 P.3d 350, 359-60 (Ct. App. 2006); State v. Fodge, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). It is equally well settled "that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error." State v. Amerson, 129 Idaho 395, 401, 925 P.2d 399, 405 (Ct. App. 1996). A claim of a speedy trial violation presents a particularly fact intensive inquiry. State v. Garcia, 126 Idaho 836, 838, 892 P.2d 903, 905 (Ct. App. 1995). For this reason, a speedy trial issue that is not argued to or considered by the court below will not be considered on appeal. Id.; Averett, 142 Idaho at 889, 136 P.3d at 360; Amerson, 129 Idaho at 401, 925 P.2d at 405. As explained by the Court of Appeals in Garcia:

> [A]n alleged violation of speedy trial rights is particularly inappropriate for consideration for the first time on appeal because the appellate record, where no speedy trial challenge was raised below, is seldom adequate to permit resolution of the claim. Such a

> claim raises mixed questions of fact and law, and determining whether the right to a speedy trial has been infringed requires application of the balancing test enunciated in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2191-92, 33 L.Ed.2d 101 (1972). This balancing test involves consideration of the length of the delay of the trial, the reason for the delay, the defendant's diligence in asserting his right, and prejudice to the defendant. The factors to be considered in this balancing process often present factual issues, particularly with respect to the reasons for the delay and whether the defendant has suffered prejudice. If a motion for relief based on speedy trial rights was not asserted before the trial court, the State has received no opportunity to present evidence or otherwise make a record addressing those issues, and the trial court has not resolved factual issues in conducting the balancing test. Therefore, when the defendant asserts a speedy trial violation for the first time on appeal, the appellate court generally has neither factual findings of the trial court to review nor an adequate record upon which the appellate court could determine whether the *Barker v. Wingo* factors weigh in favor of the defendant or the state.

Garcia, 126 Idaho at 838, 892 P.2d at 905 (internal citations omitted). *See also* Averett, 142 Idaho at 889, 136 P.3d at 360.

In this case, Folk failed to file a motion to dismiss based upon an alleged violation of his constitutional speedy trial rights, and never mentioned them to the district court. Folk made no mention of Barker v. Wingo, 407 U.S. 514 (1972), and he did not otherwise present argument on or ask the district court to consider the Barker v. Wingo factors to determine whether they weighed in favor of or against a finding of a constitutional speedy trial violation. Having failed to do so, Folk not only deprived the district court of the opportunity to make factual findings or rule upon such issues as the reasons for any pre-trial delay or whether Folk was prejudiced by such delay, he also deprived the state of its opportunity to make a record on these issues.

Folk seems to concede he did not object to any trial delays based on his constitutional rights to a speedy trial. (*See* Appellant's Brief, p.31.) Instead, he argues that although most issues cannot be raised for the first time on appeal, "[a]n exception to this rule, however, has been applied by this Court when the issue was argued to *or decided by the trial court*." (Id., (emphasis in Appellant's Brief), quoting State v. DuValt, 131 Idaho 550, 553, 961 P.2d 641, 644 (1998).) Folk implies that the trial court's findings of "good cause" to continue the trial settings (*see* Tr., p.70, Ls.2-3; p.79, L.3) were rulings on his *constitutional* rights to a speedy trial. However, "good cause" is an obvious reference to the finding required to show compliance with the *statutory* speedy trial right under I.C. § 19-3501. The trial court did not mention, much less rule upon, Folk's constitutional speedy trial rights. Folk cannot rightfully contend, as he does, that he is entitled to present his constitution-based speedy trial issues on appeal because they were "decided by the trial court." (*See* Appellant's Brief, p.31; quoting DuValt, 131 Idaho at 553, 961 P.2d at 644.)

Because Folk failed to present his speedy trial issues as constitutional issues below, and because the trial court did not make an adverse ruling in regard to such rights, Folk's constitutional speedy trial issues cannot be considered on appeal.

D. Folk Has Failed To Show His Statutory Speedy Trial Right Was Violated

1. Folk's Claim That The District Court Violated His Statutory Speedy Trial Right Is Moot

Folk argues that the district court violated his statutory right to a speedy trial under I.C. § 19-3501. This claim is moot because, even assuming there might be merit to the claim, no relief can be granted.

The mootness doctrine precludes review when "'the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" Idaho Schools For Equal Educ. Opp. v. Idaho State Bd. Of Educ., 128 Idaho 276, 281, 912 P.2d 644, 649 (1996) (quoting Bradshaw v. State, 120 Idaho 429, 432, 816 P.2d 986, 989 (1991)). "An issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded by judicial relief." State v. Barclay, 149 Idaho 6, 232 P.3d 327, 2010 WL 1632625 *2 (2010) (citations omitted). Mootness also applies when a favorable judicial decision would not result in any relief. Webb v. Webb, 143 Idaho 521, 524, 148 P.3d 1267, 1270 (2006) (citing State v. Rogers, 140 Idaho 223, 227, 91 P.3d 1127, 1131 (2004)).

Where, as here, a defendant is facing felony charges, the remedy for a statutory speedy trial violation is dismissal without prejudice. *See* I.C. §§ 19-3501, 19-3506. Thus, even had the trial court dismissed the case on the basis of a statutory speedy trial violation, the state could have simply re-filed the charges and proceeded to trial against Folk in a new criminal action. As explained in State v. Davis, 141 Idaho 828, 842, 118 P.3d 160, 175 (Ct. App. 2005) (emphasis added):

> . . . [A] violation of Section 19-3501 does not necessarily implicate the constitutional right to a speedy trial. . . .
>
> Further, Davis's contention that allowing the state to refile a charge alleging the same offense as the dismissed charge violated her right to due process is without support in the record. Statutes of limitation, which provide predictable, legislatively-enacted limits on prosecutorial delay, provide the primary guarantee against bringing overly stale criminal charges. *United States v. Lovasco*, 431 U.S. 783, 789, . . . (1977). Nonetheless, statutes of limitation do not fully define a defendant's right with respect to the events occurring prior to filing criminal charges. *Id.* The Due Process Clause has a limited role to play in protecting against oppressive delay. Id. The filing of a subsequent criminal action following dismissal of the original criminal action after preliminary proceedings is not a per se violation of due process. *Stockwell v. State*, 98 Idaho 797, 805, 573 P.2d 116, 124 (1977). However, the dismissal and refiling of criminal complaints by the prosecutor, when done for the purpose of harassment, delay, or forum-shopping, can violate a defendant's right to due process. *State v. Bacon*, 117 Idaho 679, 683, 791 P.2d 429, 433 (1990); *Stockwell*, 98 Idaho at 806, 573 P.2d at 125. *Before a due process violation can be found, the defendant must show that the preaccusation delay caused substantial prejudice to the defendant's right to a fair trial and that the delay was a deliberate device to gain an advantage over the accused. State v. Kruse*, 100 Idaho 877, 879, 606 P.2d 981, 983 (1980); *State v. Burchard*, 123 Idaho 382, 386, 848 P.2d 440, 444 (Ct. App. 1993).

The state relies upon the argument contained in section D (3), *infra*, to show that the trial court's resetting of Folk's trial date six weeks beyond the statutory speedy trial deadline did not adversely affect Folk's due process rights to a fair trial.[2] Errors that do not affect the fairness of the trial, where one is had, are generally not reviewable on appeal. *See* State v. Mitchell, 104 Idaho 493, 500, 660 P.2d 1336, 1343 (1983) (claim of error in preliminary hearing is not

[2] The relevant time frame for considering whether Folk's statutory speedy trial right was violated is based on the trial court's resetting of Folk's jury trial six weeks beyond the July 28, 2008, speedy trial deadline -- to September 8, 2008. *See* Issue I, § D(2)(b), *infra*.

ground to vacate conviction after fair trial); Loomis v. Killeen 135 Idaho 607, 613, 21 P.3d 929, 935 (Ct. App. 2001) (claim of errors in preliminary parole hearing not reviewed where there was fair parole violation hearing). Because Folk has failed to show that the alleged violation of I.C. 19-3501 of having his trial set six weeks beyond the six-month statutory speedy trial deadline affected the fairness of his criminal proceeding or trial, his claim of error is moot.

2. Folk's Request For A Continuance Within The Six-Month Statutory Period Made His Statutory Speedy Trial Right Inapplicable

Folk was charged with lewd conduct, and for being a persistent violator, in an Information filed January 28, 2008 with the district court.[3] (R., Vol. 1, pp.19-20.) Folk contends that the case against him should have been dismissed because he was not brought to trial within six months of the filing of the information, in violation of Idaho Code § 19-3501. (Appellant's Brief, pp.36-37.) However, the record makes clear there was no violation of the speedy trial provisions of that statute. Because the trial had been delayed on at least one occasion at Folk's request or consent, the speedy trial statute was not applicable.

Idaho Code § 19-3501 provides, in pertinent part, as follows:

> The court, unless good cause to the contrary is shown, must order the prosecution or indictment to be dismissed, in the following cases:
>
> . . . .
>
> 2. If a defendant, *whose trial has not been postponed upon his application*, is not brought to trial within six

[3] The Information was later amended to charge lewd conduct with notice that, upon conviction, the state would seek to have Folk sentenced as a repeat sex offender and fall under the sex offender registration requirements of I.C. § 18-8304. (R., Vol. 1, pp.56-57.)

> (6) months from the date that the indictment or information is filed with the court.

(Emphasis added.)

The plain language of the statute states that the six-month limitation applies only to a defendant "whose trial has not been postponed upon his application." Id.; *but see* State v. Young, 136 Idaho 113, 116 n.2, 29 P.3d 949, 952 n.2 (2001) (not ruling on "whether the protection granted . . . is waived . . . only when such postponement caused the trial to be rescheduled beyond the six-month period"). In this case, Folk moved for a two-week continuance of the May 27, 2008 trial date in order to prepare for a motions hearing (Supp. Tr., p.31, Ls.2-3), and when advised that the new trial date would be June 23, 2008, Folk replied, "That's fine" (Supp. Tr., p.32, Ls.17-25). Therefore, the record establishes that Folk's own motion resulted in an almost one-month delay in his trial, a fact that alone is sufficient to take this case outside the provisions of Idaho Code § 19-3501.

In State v. Wavrick, 123 Idaho 83, 88, 844 P.2d 712, 717 (Ct. App. 1992), the court addressed Wavrick's assertion that "his agreement to postpone the original trial date did not constitute a waiver of his speedy trial right under the statute because . . . he stated that postponement of the original trial date constituted only a limited waiver of his statutory speedy trial right." The court held:

> . . . I.C. § 19-3501 does not allow defendants to postpone their trial and at the same time maintain their statutory speedy trial rights. The language of I.C. § 19-3501 is clear in providing that once the trial is postponed upon the application of the defendant, the

> defendant has waived the six-month time limit for speedy trial required by the statute.

Id. In this case, once Folk agreed to postpone his trial date from May 27th to June 23rd, he waived the six-month time limit set by I.C. § 19-3501 to bring his case to trial. He is thus precluded from asserting on appeal that his statutory right to proceed to trial within six months was violated.

3. The District Court Correctly Determined There Was Good Cause To Continue Folk's Trial Beyond Six Months

a. Law Relevant To Statutory "Good Cause"

In State v. Moore, 148 Idaho 887, 231 P.3d 532, 544 (Ct. App. 2010), the Idaho Court of Appeals explained the relevant law to determine whether a defendant's statutory speedy trial right has been violated:

> When a defendant who invokes his statutory speedy trial rights is not brought to trial within six months and shows that trial was not postponed at his request, the burden then shifts to the state to demonstrate good cause for the court to decline to dismiss an action. *State v. Rodriquez-Perez*, 129 Idaho 29, 38, 921 P.2d 206, 215 (Ct. App. 1996). "Good cause" means that there was a substantial reason for the delay that rises to the level of a legal excuse. *State v. Young*, 136 Idaho 113, 116, 29 P.3d 949, 952 (2001); [State v.] *Clark*, 135 Idaho [255] at 260, 16 P.3d [931] at 936 [2000]. Analysis of whether there was good cause for a statutory speedy trial violation is not simply a determination of who was responsible for the delay and how long the case has been pending. *Young*, 136 Idaho at 116, 29 P.3d at 952. Rather, the analysis should focus upon the reason for the delay. *Id.* But the reason for the delay cannot be evaluated entirely in a vacuum and a good cause determination may take into account the additional factors listed in *Barker v. Wingo*, 407 U.S. 514, 530 . . . (1972). *See Clark*, 135 Idaho at 260, 16 P.3d at 936. Thus, insofar as they bear on the sufficiency or strength of the reason for the delay, a court may consider (1) the length of the delay; (2) whether the defendant asserted the right to a speedy trial; and (3) the prejudice to the defendant. However, the reason for the delay lies at the heart of a good cause determination under I.C. § 19-3501. *Id.*

> The ultimate question of whether legal excuse has been shown is a matter for judicial determination upon the facts and circumstances of each case. A trial judge does not have unbridled discretion to find good cause, however, and on appeal we will independently review the lower court's exercise of discretion. *Id.* We first examine the reason for the delay and then address the remaining *Barker v. Wingo* factors as they apply in this case.

Following the pattern set out in Moore, the reason for the continuance of Folk's trial beyond the six-month statutory period is the main focus of the "good cause" statutory inquiry -- while the remaining three Barker v. Wingo factors may be considered in determining the strength of that reason.

b. The Trial Court Had Good Cause To Continue Folk's Trial

Folk had the right, under I.C. § 19-3501(2), to be brought to trial within six months of the filing of the Information. Since the Information in his case was filed January 28, 2008, the state had until July 28, 2008, to bring Folk to trial.[4] The only continuance relevant in determining whether there was "good cause" to continue Folk's trial is the court's July 2, 2008 order which reset the trial beyond the statutory six-month period for the first time. *See* State v. Lundquist, 134 Idaho 831, 833, 11 P.3d 27, 29 (2000) ("Once the trial has been postponed, the six-month statutory period no longer applies."); State v. Young, 136 Idaho 113, 116 n.2, 29 P.3d 949, 952 n.2 (2001) ("In *Lundquist*, however, the defendant's requested postponement caused the trial to be rescheduled beyond the six-month period.")

[4] The trial court appears to have accepted the prosecutor's determination that Folk's speedy trial deadline was July 25, 2008. (Tr., p.10, L.23 - p.12, L.4.)

Here, the delay beyond the statutory six-month period from the filing of the Information was caused, in large part, by Folk's belated decision to represent himself against his lewd conduct charge. On May 14, 2008, about three and one-half months into his six-month statutory speedy trial period, Folk advised the court he wanted to represent himself, and his motion was granted. (Supp. Tr., p.15, L.19 - p.16, L.1; p.22, Ls.23-25.) The court noted that Folk's request opened up potential issues as to how the five-year-old victim could be appropriately cross-examined by Folk, and the prosecutor shared that concern.[5] (Supp. Tr., p.16, L.18 - p.17, L.19.)

Following the July 2, 2008, motions hearing, which included consideration of the state's motion to preclude Folk from personally cross-examining the victim, the trial court ordered a continuance because it needed time to render decisions on the motions raised. The court explained that a continuance was necessary due to the complexities of the issues, Folk's recent decision to represent himself, and Folk's insistence upon personally cross-examining the victim; the court stated:

> It's going to take me some time to review these issues. There's a lot of material that has been submitted. And these are really, at least in terms of this issue of the cross-examination and its implications to the trial and how the child is presented, there's not a lot of case law in Idaho, and it's kind of a first impression thing, and I want to make sure that I've got at least as close as I can get it to being right, which is going to take some time, which means our trial date as set now is going to have to be bumped.

---

[5] On June 10, 2008, the state filed a motion entitled, "Motion to Prohibit the Defendant from Personally Cross Examining the Young Child Victim," proposing cross-examination of the victim be by Folk's standby counsel, or alternatively, without visual contact through audio technology. (R., Vol. 1, pp.116-117.)

> I'm looking at -- and I know this is not anybody's fault; it's just the way this case has developed. We have been taking movement [sic] on this case in terms of all of these things for several months now. *And Mr. Folk is proceeding now on his own behalf, and that's -- and that has made things a little more complicated in terms of the technicalities of the trial, so we're going to have to move the trial.*

(Tr., p.67, Ls.4-23 (emphasis added).) The trial court asked Folk about setting his trial date on September 8, 2008 (Tr., p.69, Ls.2-3), putting his trial beyond the six-month period for the first time. Folk said he just had one question: "Does that affect my right to a speedy trial?" (Tr., p.69, Ls.4-6.) The court replied:

> Well, your right to a speedy trial is to be tried within six months of the Information, unless there's good cause otherwise. I am finding that because of the intricacies of this defense and the process of trying to work through the prosecution and the defense, it's really important for us to do this right, in order to afford you an opportunity to present a defense. I can't do it any other way. I've got to have some time here.

(Tr., p.69, Ls.7-15.)

Folk then asked, "And this is two months?" (Tr., p.69, L.16.) The district court reiterated:

> Well, it's the first time I can get to it. I mean, I don't have any time in August now. My August is just crammed, and I'm putting it as -- I'm going to put it on first. I can't -- well, let me put it this way. Once this is under advisement, I've got to have time to write an opinion. I'm not going to get the opinions out before the first of August. I will hope to have them shortly after the first of August, which gives you time to get the opinions and deal with them. And we will have trial on September 8th. I'm finding that there is good cause for the speedy trial issue.

(Tr., p.69, L.17 - p.70, L.3.) Folk said, "All right. Thank you." (Tr., p.70, L.4.)

The trial court had good cause to set Folk's trial beyond the statutory six-month speedy trial date.[6] The reason for the delay -- the trial court's need to prepare its decisions after the July 2 motions hearing in regard to how the victim would testify at trial -- was largely the result of Folk's late decision to represent himself and question the victim. *See* State v. Rodriquez-Perez, 129 Idaho 29, 37, 921 P.2d 206, 214 (Ct. App. 1996) (actions of the defendant in filing a late suppression motion, the prosecutor, and the trial court's crowded calendar, all contributed to the delay). In addition to the trial court's valid reasoning for the continuance, a review of Folk's case in light of the three remaining Barker v. Wingo factors, as suggested in Moore, greatly favors a finding that Folk's statutory speedy trial right was not violated. *See* Moore, 148 Idaho 887, 231 P.3d at 544.

First, the date Folk's trial was continued to -- September 8th -- was six weeks beyond his speedy trial deadline (July 28th). *See* fn.3, *supra*. Six weeks is not a significant amount of time to continue a trial involving the serious charge Folk was facing, and for the reason stated by the trial court -- to prepare legal decisions on how the victim should testify in a lewd conduct case being defended by Folk pro se. As noted in Barker, the reasonableness of length of the delay must be evaluated in light of the nature of the offense for which the defendant is standing trial: "[T]he delay that can be tolerated for an ordinary street crime is

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[6] Folk may have acquiesced in continuing his trial beyond the six-month speedy trial date. *See* State v. Dillard, 110 Idaho 834, 845, 718 P.2d 1272, 1283 (Ct. App. 1986) (defendant's assertion of speedy trial right is significant to show that he has not acquiesced in delay.); State v. Talmage, 104 Idaho 249, 253, 658 P.2d 920, 924 (1983) (delays caused or consented to by the defendant constitute waiver of statutory and constitutional speedy trial rights).

considerably less than for a serious, complex conspiracy charge." Barker, 407 U.S. 531. Considering the nature of the charge on which Folk was standing trial – lewd conduct with a minor under sixteen -- the length of the delay was not substantial and does not weigh in Folk's favor.

In regard to the next Barker factor, the dialogue between Folk and the trial court at the conclusion of the July 2, 2008 motions hearing shows that Folk did not *assert* his right to a speedy trial. Folk merely asked the court if the proffered continuance would "affect" his right to a speedy trial, and after the court explained the reasons for finding good cause to continue the trial date, Folk replied, "All right. Thank you." (Tr., p.69, Ls.4-6; p.70, L.4.) In the context of the constitutional speedy trial right, a defendant's assertion of his right is "entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." Barker, 407 U.S. at 531-32; State v. Davis, 141 Idaho 828, 839, 118 P.3d 160, 171 (Ct. App. 2005). However, "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." Id. Here, Folk's failure to assert his speedy trial right weighs in favor of a finding that his statutory speedy trial right was not violated. *See* State v. Dillard, 110 Idaho 834, 845, 718 P.2d 1272, 1283 (Ct. App. 1986) (defendant's assertion of speedy trial right is significant to show that he has not acquiesced in delay.); State v. Talmage, 104 Idaho 249, 253, 658 P.2d 920, 924 (1983) (delays caused or consented to by the defendant constitute waiver of statutory and constitutional speedy trial rights); *see also* State v. Lopez, 144 Idaho 349, 353, 160 P.3d 1284,

1288 (Ct. App. 2007) (lateness of Lopez's assertion of his speedy trial right weighs heavily against his contention that the right was violated).

Applying the last Barker factor, Folk has failed to demonstrate -- nor likely could he -- that the continuance of his trial to a date a mere six weeks beyond the statutory speedy trial deadline caused him prejudice. His arguments on appeal (*see* Appellant's Brief, pp.33-35) -- based wholly on his trial being held in January, 2009 after subsequent continuances -- are irrelevant in determining whether the one continuance that placed his trial beyond the *statutory* speedy trial deadline (July 28th) to September 8, 2008, caused him prejudice. *See* Lundquist, 134 Idaho at 833, 11 P.3d at 29; Young, 136 Idaho at 116 n.2, 29 P.3d at 952 n.2. Folk claims he was prejudiced by having to go to trial in January, 2009, because by that time, T.R.'s memory had faded, and the state had time to get their 404(b) witnesses from out of state to testify at trial. (Appellant's Brief, pp.33-35.) Neither allegation is remotely relevant in showing whether Folk's due process rights were prejudiced by the continuance of his trial date to September 8, 2008.

In light of the valid reasons for the trial court's July 2, 2008, continuance of Folk's trial to a date six weeks beyond the statutory six-month speedy trial period, and in consideration of the length of the delay, Folk's failure to assert his speedy trial right when the continuance was being considered, and the lack of any possible prejudice to such continuance, Folk has failed to show any violation of his speedy trial right under I.C. § 19-3501.

II.

Folk Has Failed To Show That His Constitutional Right To Confront His Accuser Was Violated

A. Introduction

On appeal, Folk contends the trial court violated his Sixth Amendment right to confront his victim, T.R., by: (1) permitting T.R.'s testimony to be done outside Folk's presence through closed circuit video; (2) ruling Folk could only cross-examine T.R. by submitting written questions for his standby counsel to ask; (3) modifying the permissible method of impeaching T.R. with his preliminary hearing testimony; and (4) limiting the duration of T.R.'s cross-examination. (Appellant's Brief, pp.37-56.)

Because Folk agreed that T.R.'s testimony could be presented outside his presence, any claim that the trial court erred in allowing T.R. to testify remotely was waived under the invited error doctrine. Even if considered, the trial court properly found that forcing T.R. to testify in Folk's presence would cause T.R. to suffer serious emotional trauma and adversely impact his ability to communicate. Folk's assertions that his right to confrontation was violated by the trial court's order that he cross-examine T.R. by submitting written questions to his standby counsel, changing the way Folk could impeach T.R. with the preliminary hearing transcript, and prompting Folk to get through his cross-examination of T.R., are not supported by any authority and are waived.

B. Standard Of Review

Whether a defendant's Sixth Amendment right to confront adverse witnesses was violated is a question of law over which appellate courts exercise

free review. State v. Hooper, 145 Idaho 139, 142, 176 P.3d 911, 914 (2007). The trial court has broad discretion in the admission of evidence, and its judgment will be reversed only when there has been an abuse of that discretion. State v. Howard, 135 Idaho 727, 731-32, 24 P.3d 44, 48-49 (2001); State v. Zimmerman, 121 Idaho 971, 974, 829 P.2d 861 (1992).

C. Any Assertion That Folk's Confrontation Rights Were Violated Because T.R.'s Testimony Was Presented Outside Folk's Presence Is Waived Under The Invited Error Doctrine

During the July 2, 2008 motions hearing, Folk agreed that T.R.'s testimony could be conducted outside his presence. He stated:

> The defense does not object to the identity of the defendant being concealed from the witness. To ease the witness's testimony, they can either alter my voice and [sic] not show myself to the witness.

(Tr., p.63, Ls.9-12.)

The doctrine of invited error estops a party from asserting an error when his own conduct induced the commission of the error. State v. Atkinson, 124 Idaho 816, 819, 864 P.2d 654, 657 (Ct. App. 1993). Similarly, a party may not complain of errors he has consented to or acquiesced in. State v. Caudhill, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985). Under the doctrine of invited error, Folk is precluded from claiming that the district court improperly ordered T.R.'s testimony to be presented outside Folk's immediate presence. As Folk's appellate counsel seems to acknowledge, Folk waived his right to challenge on appeal the trial court's determination that T.R.'s testimony would be done outside Folk's presence through closed circuit video. (*See* Appellant's Brief, p.41

("Whether or not *Craig*[7] is still valid law was not technically preserved in the instant case because Mr. Folk may have conceded the issue"; p.58 ("Mr. Folk did not object to having the child concealed from him to eliminate any possible concern the State may have with his interaction with the child.").) Inasmuch as Folk agreed that T.R.'s testimony could be done outside his presence, Folk cannot complain that the trial court erred in permitting T.R. to testify that way.

D. Folk Has Failed To Show The Trial Court Erred In Determining T.R. Could Testify Outside Folk's Presence Because He Would Suffer Serious Emotional Trauma And Adversely Impact His Ability To Communicate

After a motions hearing, the trial court issued a written opinion on whether T.R. should testify outside the presence of Folk and whether Folk would be allowed to personally ask questions during T.R.'s cross-examination. (R., Vol. 2, pp.196-205.) Although, as discussed, Folk agreed to not be personally present during T.R.'s testimony (*see* Tr., p.63, Ls.9-12), the district court's written opinion covered the "presence" issue just as if Folk had objected. The relevant portions of the court's decision, although lengthy, reflect that the court reasonably applied the operative law to the relevant facts in ruling T.R. could testify by closed circuit video outside Folk's presence. The court explained:

> The Sixth Amendment guarantees the accused the right to "be confronted with the witnesses against him." The Supreme Court has said that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." [Citations omitted.]

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[7] *See* Maryland v. Craig, 497 U.S. 836, 857 (1990) (child sexual abuse victims permitted to testify against alleged abuser out of his presence and outside of the courtroom by closed circuit television).

> The [C]ourt has "never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." *Maryland v. Craig*, 497 U.S. 836, 844 (1990). The preference for face to face confrontation "must occasionally give way to considerations of public policy and the necessities of the case." *Craig*, 497 U.S. at 849 (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).
>
> When analyzing whether the preference for face to face consideration must give way, courts must determine whether using some procedure other than direct cross examination "is necessary to further an important state interest." *Craig*[,] 497 U.S. at 852.
>
> . . . .
>
> The *Craig* court found that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Id.* at 853. The *Craig* court went on to determine that "if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." *Id.* at 855.
>
> Essential to the finding in *Craig* was that the trial court made a "case-specific finding of necessity." *Id.* at 860. Courts must determine that any trauma to the child is brought on by testifying in the presence of the defendant, not merely by testifying in the courtroom. *Id.* at 856. *Craig* requires trial courts to "hear evidence and determine whether use of [alternate procedures] is necessary to protect the welfare of the particular child witness who seeks to testify."
>
> In this case, the court has heard sufficient testimony to determine that forcing T.R. to be cross examined in the presence of Defendant would cause T.R. to suffer serious emotional trauma that would substantially impair T.R.'s ability to communicate. Specifically Ms. Reed has testified that T.R. has suffered from nightmares about Defendant,[8] and T.R. himself has testified that

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[8] The state has filed a motion to augment the record on appeal with the preliminary hearing transcript in Folk's case, which will be referred to as "Prelim. Tr." Charity Reed, T.R.'s mother, testified during that hearing that T.R. woke up

> Defendant told T.R. not to tell anyone about the incident.[9] Given these factors along with T.R.'s young age, the court concludes that there is clear and convincing evidence to support taking T.R.'s testimony by alternate means consistent with I.C. § 9-1805.[10]
>
> Allowing T.R. to present his testimony through closed circuit television satisfies the requirements of the confrontation clause. Defendant's standby counsel will have the opportunity to cross examine T.R. in view of the jury. The procedure preserves Defendant's right of confrontation, in satisfaction of the requirements of the *Crawford* [v. Washington, 541 U.S. 36 (2004)] and *Craig* cases.

(R., Vol. 2, pp.198-200.)

Folk has failed to show the trial court abused its discretion in finding T.R. would suffer serious emotional trauma and substantially impair his ability to communicate. In addition to the factors noted by the court -- T.R.'s age, T.R. suffered nightmares about the incident, and Folk warned T.R. not to tell anyone,

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at 4:00 the morning after the incident, and said "he had a nightmare about what the guy did to him last night." (Prelim. Tr., p.5, L.23 - p.6, L.12; p.13, Ls.2-4.)

[9] T.R. testified at the preliminary hearing that Folk covered his mouth after the incident because he didn't want anyone to know "that he did it." (Prelim. Tr., p.40, Ls.6-11; *see* id., p.38, Ls.1-20.) The record before the trial court included two state memoranda indicating Folk told T.R. not to tell the police. (R., Vol. 1, p.73 (in interview, T.R. said "Folk told him not to tell the police."); p.129 (same).)

[10] I.C. § 9-1808, reads in relevant part:

> (1) In a criminal proceeding, the presiding officer may order the presentation of the testimony of a child witness by an alternative method only in the following situations:
>
> . . .
>
> (b) A child witness' testimony may be taken other than in a face-to-face confrontation between the child and a defendant if the presiding officer finds by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact required to be confronted face-to-face by the defendant.

the court was also aware that the nature of the allegation against Folk concerned a very personally embarrassing subject -- that Folk had oral-to-genital contact with T.R. (*See* R., Vol. 1, p.19.) Based on those factors, the trial court properly concluded that if T.R. were forced to testify in Folk's direct presence, T.R. would "suffer serious emotional trauma that would substantially impair [his] ability to communicate," permitting T.R. to testify outside Folk's presence. (R., Vol. 2, p.200.)

E. Folk's Arguments That The Trial Court Violated His Sixth Amendment Right To Confrontation By Limiting The Manner And Duration Of His Cross-Examination Of T.R. Are Not Supported With Authority And Should Not Be Considered On Appeal

Folk also asserts the trial court denied him his Sixth Amendment right to confrontation by (a) ruling Folk could only cross-examine T.R. by submitting written questions for his standby counsel to ask, (b) modifying the permissible method of impeaching T.R. by allowing relevant portions of his preliminary hearing transcript to be read into the record by the judge's law clerk (*see* Tr., p.335, Ls.15-20),[11] and (c) limiting the duration of T.R.'s cross-examination by prodding Folk to complete it before T.R.'s attention was exhausted.[12] (Appellant's Brief, pp.51-56.) The only authority Folk provides in regard to these

[11] Folk claims the trial court originally instructed him "that a reader would be made available to T.R. to attempt to impeach [T.R.'s] testimony," but changed the rules in the middle of trial to allow "the prior testimony to be read into the record." (Appellant's Brief, p.53.) The state is unclear as to what difference Folk discerns between the trial court's two statements.

[12] The trial court told Folk that T.R.'s "attention span has about had it, and we're going to get this done." (Tr., p.334, L.25 - p.335, L.1.) T.R. fell asleep later during cross-examination. (Tr., p.348, Ls.2-4.)

issues is the general acknowledgement that a district court "has broad discretion to limit cross-examination to prevent harassment, prejudice, confusion of the issues or if the testimony is only marginally relevant." (Appellant's Brief, pp.51-56; and p.52 (quoting State v. Hensley, 145 Idaho 852, 187 P.3d 1227 (2008).)

In State v. Zichko, 129 Idaho 259, 923 P.2d 966 (1996), the Idaho Supreme Court held:

> When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered. Earlier formulations of this rule stated that an issue was waived if it was not supported with argument and authority. A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking. Zichko supported this assignment of error with argument but no authority. Consequently, he waived this issue on appeal.

Zichko, 129 Idaho at 263, 923 P.2d at 970 (citations omitted); *see* I.A.R. 35. Pursuant to Zichko, because Folk has failed to present authority in support of the three above-described issues he purports to raise on appeal, this Court should not consider them.

III.
Folk Has Failed To Show That His Constitutional Right To Self-Representation Was Violated

A. Introduction

Folk argues that the trial court violated his Sixth Amendment right to represent himself at trial by ruling Folk could only cross-examine T.R. by submitting written questions for his standby counsel to ask. (Appellant's Brief, pp.56-70.) However, the trial court properly found that having Folk provide

written questions for standby counsel to ask during T.R.'s cross-examination did not violate Folk's right to represent himself.

B. Standard Of Review

An appellate court will defer to findings of fact supported by substantial evidence, but freely review the application of constitutional requirements to the facts found. State v. Jennings, 122 Idaho 531, 533, 835 P.2d 1342, 1344 (Ct. App. 1992); *see, e.g.*, State v. Hunnel, 125 Idaho 623, 626, 873 P.2d 877, 880 (1994); State v. Jackson, 140 Idaho 636, 639-41, 97 P.3d 1025, 1028-30 (Ct. App. 2004) (citing cases). The trial court has broad discretion in the admission of evidence, and its judgment will be reversed only when there has been an abuse of that discretion. Howard, 135 Idaho at 731-32, 24 P.3d at 48-49; Zimmerman, 121 Idaho at 974, 829 P.2d 861.

C. Folk Has Failed To Show The Trial Court Erred By Ruling That His Standby Counsel Would Personally Cross-Examine T.R. By Asking Questions Prepared By Folk

After hearing argument on the state's motion to preclude Folk from personally cross-examining T.R. (Tr., p.61, L.14 - p.64 , L.11), the district court issued a written opinion granting the state's motion and requiring T.R.'s cross-examination be done by Folk's standby counsel reading questions prepared by Folk (R., Vol. 2, pp.203-204.) The trial court reviewed and applied the appropriate law to the facts in Folk's case as follows:

> In addition to the right of confrontation, the Sixth Amendment also grants defendants an implied right to represent themselves at trial. *Faretta v. California*, 422 U.S. 806, 832 (1975). This right is not absolute, and the Supreme Court has developed a two part test

to determine if unsolicited participation by counsel violates a defendants [sic] right of self representation: "First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury . . . Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself." *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984).

The United States Supreme Court, the Ninth Circuit Court of Appeals, and the Idaho Supreme Court appear not to have considered limitations on a pro se defendant's right to personally cross examine a child victim in a sexual abuse case.

Other jurisdictions have applied the *Faretta*, *Craig*, and *McCaskle* [sic] cases to similar situations as the one now before this court. In *State v. Estabrook*, 842 P.2d 1001 (Wash.Ct.App. 1993), a Washington state appellate court examined whether preventing a defendant in a sex abuse case from directly cross examining the developmentally delayed child victim violated the rights outlined in *Faretta* and McKaskle. In the *Estabrook* trial:

> [T]he trial court directed Estabrook to submit his cross examination questions in writing to the court. The judge then asked those questions after advising the jury that:
>
> > At this time, as I have told you, Mr. Estabrook has the right of cross-examination. But because of the fact that he is not represented by an attorney, I am going to be asking the questions that he has asked me to ask . . . . They are Mr. Estabrook's questions.
>
> During trial, the court gave Estabrook additional time after J.H.'s direct testimony to prepare his questions. In addition, the trial court allowed "Mr. Estabrook to ask all the questions he needs to ask," and refused to sustain any scope objections to Estabrook's proposed questions.
>
> *Estabrook*, 842 P.2d at 1004.

The appellate court found that this procedure satisfied the two part test in *McKaskle* by allowing the defendant to maintain actual control over the case and by not destroying the jury's

> perception that the defendant was representing himself. *Id.* at 1006.
>
> The Fourth Circuit Court of Appeals, in *Fields v. Murray*, 49 F.3d 1024 (4th Cir. 1995), also considered a Virginia case where a defendant was not allowed to personally cross examine the child victims in a sex abuse case. The defendant in *Fields* was represented by counsel throughout trial but requested that he be allowed to personally cross examine the victims. Though the court determined that the defendant had not invoked his right to self representation, it nonetheless examined whether the trial court's refusal to allow the defendant to cross examine the victims violated the right of self representation. *Fields*[,] 49 F.3d at 1034.
>
> The Fourth Circuit held that the trial court's refusal complied with the two part test in *McKaskle* and the standards set forth in *Craig*. *Id.* at 1036. Additionally, the court held that "The State's interest here in protecting child sexual abuse victims from the emotional trauma of being cross-examined by their alleged abuser is a least as great as, and likely greater than, the State's interest in *Craig* of protecting children from the emotional harm of merely having to testify in their alleged abuser's presence." *Id.*

(R., Vol. 2, pp.200-202.) The trial court concluded that, as expressed in Estabrook, giving Folk the opportunity to write questions for cross-examination satisfies the first prong of the McKaskle test -- allowing the defendant to keep control over the case presented to the jury. (Id., p.202; *see* McKaskle, 465 U.S. at 178; Estabrook, 842 P.2d at 1006.) Apart from being able to personally ask the questions during the cross-examination of T.R., Folk had control over every other aspect of his trial -- meeting the first prong of the McKaskle test.

The trial court next evaluated the complaint by Folk's standby counsel that having him read questions prepared by Folk would make it appear that counsel was representing Folk, in violation of the second prong of the McKaskle test. (R., Vol. 2, pp.203-204.) The trial court was not swayed by that argument, and

instead followed the reasoning in Fields v. Murray, 49 F.3d 1024 (4th Cir. 1995),[13] explaining:

> The *Fields* court found that "Denying personal cross-examination may have inhibited Fields' dignity and autonomy to some degree by affecting 'the jury's perception that [he was] representing himself,' but, as he would have conducted every other portion of the trial, his dignity and autonomy would have been 'otherwise assured.'" *Fields*[,] at 1035 (quoting *McCaskle* [sic], 465 U.S. at 174). The court found that denying the defendant the right to directly cross examine the victim did not violate the *Craig* and *McKaskle* requirements *because it was clear to the jury from the rest of the trial that the defendant was representing himself.* Here, the court anticipates that Defendant will be conducting the entirety of his defense. Informing the jury that Defendant prepared the questions and having standby counsel conduct the cross examination of T.R. will not destroy the jury's perception that Defendant is proceeding pro se.

(R., Vol. 2, p.203 (emphasis added).) The trial court found that having standby counsel read the questions prepared by Folk to cross-examine T.R. would not "unduly infringe upon [Folks'] right of self representation." (Id.) As noted, Folk had control over every other aspect of his trial, therefore, the jury would not have been confused over whether he was representing himself.

Folk has failed to show any error in the trial court's findings in regard to the two-prong test of McKaskle. Having Folk write cross-examination questions out for his standby counsel to read did not deny Folk the ability to actually control the case he presented to the jury. He had total control over every other facet of his trial, and drafted the questions asked of the one witness he was not allowed

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[13] In Fields, the Fourth Circuit held that a defendant's right to personally cross-examine the witnesses against him could be restricted if the purposes of the self-representation right would have been "otherwise assured," and if denial of personal cross-examination was necessary to further an important public policy. Fields, 49 F.3d at 1035.

to be present with. Nor did the "written question" procedure ordered to cross-examine T.R. destroy the jury's perception that he was representing himself. McKaskle, 465 U.S. at 178.

Additionally, the trial court mirrored Fields' finding that '"[t]he State's interest here in protecting child sexual abuse victims from the emotional trauma of being cross-examined by their alleged abuser *is at least as great as, and likely greater than*, the State's interest in *Craig* of protecting children from the emotional harm of merely having to testify in their alleged abuser's presence.'" (R., Vol. 2, p.203 (quoting Fields, 49 F.3d at 1036) (emphasis added).) In light of the State's great interest in protecting T.R. from trauma caused by cross-examination by Folk, the trauma likely to affect T.R. if Folk was allowed to personally cross-examine him,[14] and because the method of T.R.'s cross-examination meets the McKaskle test, Folk has failed to show the trial court erred.

IV.
Folk Has Failed To Demonstrate The Trial Court Erred By Its Answer To The Jury's Question About Instruction Sixteen

A. Introduction

After the jury began deliberating, the jury sent the judge a written question which read:

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[14] The factors listed in regard to whether Folk's right to confrontation was violated by T.R. testifying through closed circuit video apply equally, if not more, to Folk's self-representation claim that he should have been permitted to personally cross-examine T.R. For the sake of brevity, the state relies on its argument presented in § II D, *supra*.

> Your Honor, referring to Instruction 16, No. #3; are we proving oral, genital contact or is this an issue of any lewd and lascivious conduct. Is this a matter of John doing oral sex with [T.R.] or any type of sexual advancement. If lewd and lascivious is the case, what a [sic] definition of lewd and lascivious.

(R., Vol. 2, p.270.) The district court sent the jury the following clarifying instruction:

> "Lewd and Liscivious [sic] Conduct" is the statutory name for a category of sexual touching crimes which include oral-genital contact, genital-genital contact, genital-anal contact, manual-genital contact, manual-anal contact, oral-anal contact, etc. *Here the allegation is oral-genital (mouth to penis) contact, which is, by definition, lewd and lascivious conduct.*

(Tr. p.742, L. 25 - p.743, L.7(emphasis added).) Folk objected to the inclusion of the word "etc." by asking the trial judge to remove it his answer. (Tr., p.743, Ls.15-18) The trial judge denied Folk's request, explaining he kept "etc." in his clarifying instruction in order to track the lewd conduct statute by not only including all the combinations listed, but to also reflect that the list is not exclusive.[15] (Tr., p.743, L.21- p.744, L.5.)

On appeal, Folk argues "the district court denied him his right to due process of law by instructing the jury that lewd conduct may be committed by making any type of sexual advance upon the victim when it refused to remove the 'et cetera' from the clarifying instruction." (Appellant's Brief, p.70.) However, Folk misconstrues the trial court's clarifying instruction, and ignores its plain directive that the jury only consider the allegation that Folk had oral-genital contact with T.R. The instructions did not misstate the law or confuse the jury

[15] I.C. § 18-1508 defines lewd and lascivious acts upon a minor under sixteen as "including but not limited to" the various combinations of sexual contact listed.

about what conduct was alleged to constitute the crime of lewd and lascivious conduct.

B. Standard Of Review

Whether a jury was properly instructed is a question of law over which the appellate court exercises free review. State v. Gleason, 123 Idaho 62, 65, 844 P.2d 691, 694 (1992); Miller v. State, 135 Idaho 261, 265, 16 P.3d 937, 941 (Ct. App. 2000). To be reversible error, any error in the jury instructions must have misled the jury or prejudiced the complaining party. State v. Johnson, 145 Idaho 970, 977, 188 P.3d 912, 919 (2008); State v. Row, 131 Idaho 303, 310, 955 P.2d 1082, 1089 (1998).

C. Folk Has Failed To Show Any Error, Much Less Prejudicial Error, In The Trial Court's Clarifying Instruction

In essence, the jury's written question to the trial court asked two things: (a) what constitutes lewd and lascivious conduct? and (b) what specific act of lewd conduct was Folk alleged to have committed? The court's response first informed the jury of the specific combinations of physical contact that are statutorily defined as lewd conduct, then let the jury know, in attempting to follow the statute, that the list is not exclusive by inserting "etc." at the end of the litany. (Tr. p.742, L. 25 - p.743, L.5.) In addressing the jury's question about what specific lewd conduct Folk was charged with committing ("Is this a matter of John doing oral sex with [T.R.] or any type of sexual advancement"), the trial court did not mince words: "Here the allegation is oral-genital (mouth to penis) contact, which is, by definition, lewd and lascivious conduct." (Tr. p.743, Ls.5-7.) The

clarity of that statement needs no interpretation or parsing -- Folk was accused of having "oral-genital (mouth to penis) contact" with T.R.[16]

It is well established that jurors are presumed to have followed instructions. *See, e.g.,* Packard v. Joint School Dist. No. 171, 104 Idaho 604, 612, 661 P.2d 770, 778 (Ct. App. 1983) ([W]here jury instructions are clear, an appellate court will presume that the jurors have heeded the instructions given by the trial court."); State v. Brown, 53 Idaho 576, 585, 26 P.2d 131, 135 (1933) ("[I]t must be presumed that the jurors observed and applied the instructions given them."). There is no basis for believing that the trial court's written answer to the jury's question was inadequate where the jury was last given the directive, "Here the allegation is oral-genital (mouth to penis) contact, which is, by definition, lewd and lascivious conduct." Folk has failed to demonstrate any error in the trial court's clarifying instruction.

[16] Folk states: "The district court denied Mr. Folk's request and gave the jurors the instruction authorizing it to find sexual advancement included in the conduct prohibited under the lewd conduct statute." (Appellant's Brief, p.72.) Folk's contention that "etc." in the court's response referred to "any type of sexual advancement" mentioned in the jury's question is conclusory and unfounded. There is nothing in the trial court's response that connects "etc." to the phrase "any type of sexual advancement" in the jury's question. The question asked by the jury was in the disjunctive, "Is this a matter of John doing oral sex with [T.R.] *or* any type of sexual advancement." (R., Vol. 2, p.270 (emphasis added).) The trial court clarified which of the two types of conduct posited by the jury constituted the crime Folk was charged with committing -- "Here the allegation is oral-genital (mouth to penis) contact . . .." (Tr. p.743, Ls.5-7.)

V.

Folk Has Failed To Show That The Cumulative Error Doctrine Applies To This Case

Under the doctrine of cumulative error, a series of errors, harmless in themselves, may in the aggregate show the absence of a fair trial. State v. Martinez, 125 Idaho 445, 453, 872 P.2d 708, 716 (1994). A necessary predicate to application of the doctrine is a finding of more than one error. State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998). Folk has failed to show that two or more errors occurred in his trial, and therefore the doctrine is inapplicable to this case. *See*, *e.g.*, LaBelle v. State, 130 Idaho 115, 121, 937 P.2d 427, 433 (Ct. App. 1997). Even if errors in the trial had been shown, they would not amount to a denial of due process that would require reversal. State v. Gray, 129 Idaho 784, 804, 932 P.2d 907, 927 (Ct. App. 1997); State v. Barcella, 135 Idaho 191, 204, 16 P.3d 288, 301 (Ct. App. 2000) (accumulation of errors deemed harmless).

CONCLUSION

The state respectfully requests that this Court affirm Folk's judgment of conviction.

DATED this 17th day of August 2010.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of August 2010, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

DIANE M. WALKER
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

John C. McKinney
Deputy Attorney General

JCM/pm